IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 287 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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USHAKANT N PATEL - Applicant(s)

Versus

COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR KH KAJI for Applicant(s) : 1,

MR MANISH R BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 22/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The applicant-assessee has proposed the following eight questions.

1. Whether, in the facts and circumstances of the case, the Tribunal was right in law in holding that sec. 132(4A) was applicable in the course of assessment proceedings and presumptions created by it would place burden on the assessee to establish to the contrary the rebuttable presumptions raised by the above section and in further ignoring the decision of the Calcutta High Court in that behalf ?

1. Whether, in the facts and circumstances of the case, the Tribunal was right in law in throwing on the assessee a negative burden to establish that the hand-writings in the note-book and the slips were not his or any of his persons, relying on the rebuttable presumptions provided by sec. 132(4A) which was not applicable?
2. Whether, in the facts and circumstances of the case, the Tribunal was right in law in ignoring a very material fact mentioned and accepted by the CIT (A) that the Assessing Officer had taken the writings of the assessee and other persons connected with him and none of such persons were examined by the Assessing Officer before coming to the conclusion that the hand-writing belonged to the assessee?
3. Whether, in the facts and circumstances of the case, the Tribunal was right in law in holding that the order of CIT (A) was also erroneous as regards the Accounting year found by the Assessing Officer as relatable to A.Y. 1983-84 when there is no mention at all of any year in the said papers and the provisions of sec.69 were not applicable as it was not a case of unexplained investment being found ?
4. Whether, in the facts and circumstances of the case, the Tribunal was right in law in holding that the order of the CIT (A) was erroneous as he did not comment in detail on the reasons enumerated by the Assessing Officer for including the said amounts as income of the assessee ?
5. Whether, in the facts and circumstances of the case the Tribunal erred in not considering that the CIT (A) having found that the said writing did not belong to the assessee, the question of examining the details of the cash-book, the ledger and the five loose sheets and there was no occasion for the CIT (A) to go into the details of the reasonings of the Assessing Officer with regard to the various amounts mentioned therein ?

6. Whether, in the facts and circumstances of the case, the Tribunal was right in law in observing that the CIT (A) had not commented upon applicability of sec. 132(4A) and sec. 69 which are purely law points and should have been decided by the Tribunal ?
7. Whether, in the facts and circumstances of the case, the Tribunal erred in summarily reversing the findings of the CIT (A) without any justifiable basis and instead of going through the legal and factual aspects of the matter, erred in remanding the matter to the CIT (A) ?

1. However, the Income Tax Appellate Tribunal, Ahmedabad Bench-C has referred the following question under Section 256 (1) of the Income Tax Act, 1961 (the Act) after reframing the same to bring out the real controversy and observing that question Nos. 1 to 7 as proposed are mere arguments and facets of reframed question No.8.

"Whether, on the facts and circumstances of the case and material on record, the Tribunal was justified in remanding the matter to the CIT (A) ?"

1. For assessment year 1983-84 the relevant accounting period is financial year ended on 31st March, 1983 and for assessment year 1984-85 the relevant accounting period is financial year ended on 31st March, 1984. The Assessing Officer made an addition of Rs.48,14,727/= for assessment year 1983-84 on the ground that the same were unexplained investments as per note-books and loose papers which were seized during proceedings under Section 132 of the Act carried out on 3-6-1983. Similar addition of Rs.32,000/= was made for assessment year 1984-85. The additions were made after rejecting the explanation tendered by the assessee and casting onus on the assessee by raising statutory presumptions prescribed under Section 132(4A) of the Act.
2. The assessee carried the matter in appeal before Commissioner (Appeals) for both the years. The Commissioner (Appeals) allowed the appeals of the assessee holding that the Assessing Officer had not established that the diaries and the loose papers seized in the course of search and seizure proceedings belonged to the assessee. The Commissioner (Appeals) also recorded that there was no evidence to show that the documents contained the hand-writing of the assessee. Lastly it was held that there was no basis for the Assessing Officer to conclude from the seized documents that the assessee had made investments to the tune of Rs.48,14,727/=, and that the investments, if any, were made in the financial year corresponding to assessment year 1983-84, and hence, the Assessing Officer could not have invoked Section 69 of the Act.
3. The revenue preferred appeals before the Tribunal. The order of Commissioner (Appeals) was faulted with by the Tribunal and the appeal

was restored to the file of Commissioner (Appeals). In the process the Tribunal held that the burden was on the assessee in view of provisions of Section 132(4A) of the Act to lead evidence to rebut the presumptions raised by the said Section. The Tribunal further held that the Commissioner (Appeals) had no basis for recording a finding that the hand-writing in the books seized was not that of the assessee. Ultimately after holding that all the findings of Commissioner (Appeals) were baseless and useless, the Tribunal finally remanded the matter to the first appellate authority for a fresh decision after taking note of the observations made by the Tribunal.

4. Mr. K.H.Kaji, the learned advocate appearing on behalf of the applicant-assessee assailed the order of Tribunal on various counts. However, his principal grievance was that the Tribunal had erred in reading provisions of section 132(4A) of the Act by holding that the said provision was applicable even during the course of regular assessment proceeding. According to him the said provision had limited applicability and the presumptions raised by the Section were only for the purpose of retention of the assets etc. as specified in Section 132(5) of the Act. He also made a grievance that in case the Tribunal was inclined to restore the appeals to the file of Commissioner (Appeals), the Tribunal ought not to have recorded any findings/observations in relation to applicability or otherwise of provisions of Section 132(4A) of the Act. He lastly urged that the issue as to whether Section 132(4A) of the Act can be invoked beyond Section 132(5) order or not, may be decided by the Court. In support of the submissions made by him he placed reliance on a decision of the Delhi High Court in the case of Daya Chand v. Commissioner of Income Tax, (2001) 250 ITR 327 and Allahabad High Court in the case of Pushkar Narain Sarraf v. Commissioner of Income Tax, (1990) 183 ITR 388. The submission was that provisions of Section 132(4A) of the Act are not available during course of regular assessment proceedings because otherwise, it would lead to a artificial distinction, not warranted by the scheme of the Act, between persons who are subjected to search proceedings, and those persons who are not subjected to search proceedings. Mr. Kaji submitted that there was no rationale or logic in creating such a distinction. It was further submitted that,on a plain reading of Section 132(4A) of the Act there was an inherent indication that the said Section was restricted in application upto the point of time the order under Section 132(5) of the Act came to be made, because the Section dealt with not only documents, but also assets.

5. Mr. M.R.Bhatt, the learned Senior Standing Counsel appearing on behalf of the respondents submitted that Section 132(4A) applies to all proceedings and the Section only relates to a rule of evidence not warranting any restrictive application. Referring to the legislative history it was submitted that Section 132(5) of the Act came on the statute book in 1965 and came

to be deleted in 1995, while Section 132(4A) of the Act came on the statute book in 1975 and has not been deleted. That Section 132(4A) of the Act has to be read as a part of Section 132(4) of the Act ; that both the provisions fall within the chapter dealing with powers of authorities. According to Mr. Bhatt, Section 132(4A) of the Act only lays down rule of evidence, and prescribes only the starting point namely, the date of search for applicability of the provision with no closing point or limitation on the applicability. He placed reliance on the decision of the Karnataka High Court in case of Commissioner of Income Tax vs. P.R.Metrani (2001) 251 ITR 244 to submit that the presumptions arising under Section 132(4A) of the Act are only raising rebuttable presumptions and cannot be restricted for the only purpose of passing an order under Section 132(5) of the Act. He also placed reliance on a decision of this Court in the case of Khandubhai Vasanji Desai and others v. Deputy Commissioner of Income Tax and another (1999) 236 ITR 73 with special reference to the observations made at page 95. Mr. Bhatt also made a submission that if the Court was inclined to concur with the final conclusion of the Tribunal, namely restoring the appeals to the file of Commissioner (Appeals), the Court may clarify the position and leave all the issues open, including applicability of Section 132(4A) of the Act.

6. The Tribunal while passing the impugned order dated 27th April,1993 has come to the conclusion that “In our considered view all the reasons employed by the learned first appellate authority are baseless and useless. In fact the matter should have been decided on the basis of the material placed on record and the relevant provisions and the facts established on behalf of the parties. This exactly is seen not to have been done.” When one reads the order of the Tribunal as a whole, one cannot but observe that the aforesaid remarks made by the Tribunal in relation to the order of the first appellate authority are equally applicable to the order made by the Tribunal. Even if one proceeds on the assumption that the Commissioner (Appeals) had committed an error while passing the order, the Tribunal has committed the same error while passing the impugned order.
7. The principal ground on which the Tribunal finds fault with the order of the first appellate authority is applicability of Section 132(4A) of the Act. According to the Tribunal once the said Section raises statutory presumptions, nothing more was required to be done and addition made by the Assessing Officer under Section 69 of the Act had to proceed as a natural corollary. The entire premise adopted by the Tribunal is fallacious. In the facts of the present case it is not possible to delink applicability of Section 132(4A) of the Act and provisions of Section 69 of the Act.
8. Section 132(4A) of the Act lays down that during the course of search where any books of accounts, other documents, money etc. are or is found

in the possession or control of any person, it may be presumed:- (1) that such books of account etc. belong to such person ; (2) that the contents of such books of account and other documents are true ; and (3) that the signature and every other part of such books of account and other documents which purport to be in the hand-writing of any particular person, or which may reasonably be assumed to have been signed by, or to be in the hand-writing of, any particular person, are in that person's hand-writing etc. On a plain reading of the aforesaid provision it is apparent that clauses (i) and (ii) raise a presumption that the books of account belong to the person searched, or the person from whose possession or control the books are recovered or found, and that the contents of such books are true. However, when it comes to clause (iii) of Section 132(4A) of the Act, it raises a presumption in relation to the signature and the hand-writing to be of the person in whose hand-writing the books etc. are purported to be, or a reasonable assumption may be raised that the books etc. are signed by or are in the hand-writing of any particular person. The distinguishing feature is, the clause does not necessarily raise a presumption qua the person searched or from whose possession the books are found. The language employed in clauses (i) and (ii) is “such person”, meaning thereby the person searched or from whose possession or control the books are found. As against that, the language employed by clause (iii) talks of raising a presumption in relation to “any particular person”, who may be the person searched, or may not necessarily be the person searched. In a given case, the books might bear the name of the owner and yet they may be found in possession of, or control of another person. Then, in such an eventuality the presumption as to the signature and hand-writing would arise against the person in whose name the books stand. By way of illustration, judicial note can be taken note of the fact that books of account are handed over to persons who work as part time accountants, and in such circumstances, the presumption has to be in relation to the person whose transactions are reflected in the books and such transactions cannot be presumed to have been carried out by the person who writes the accounts.

9. Applying the aforesaid provision to the facts of the case, at best the authorities and the Tribunal could have raised presumption that the books have been recovered from the possession of the assessee (though disputed by the assessee), and belong to the assessee and the contents thereof are true ; but from that, it does not necessarily follow that a presumption would arise as to the books or the documents being in the hand-writing of the assessee. The Tribunal, has brushed aside the finding recorded by the Commissioner (Appeals) regarding the books/documents not being in the hand-writing of assessee, by a sweeping statement without taking note of the finding recorded by Commissioner (Appeals) in

paragraph No. 23. The Tribunal has committed this error only because it proceeded on the footing that clause (iii) of Section 132(4A) of the Act raises a presumption qua the person searched or the person from whose possession or control the books or documents are recovered when the language does not indicate it to be so in all cases.

10. What is more material is that the Assessing Officer made an addition under Section 69 of the Act and the Commissioner (Appeals) found that there was no basis to hold that the investments, if any, were made in the financial year corresponding to the assessment year under consideration. The Tribunal has dealt with this issue in a very cursory manner when it observed “The learned CIT (A) also found fault with the Assessing Officer's action on account of the difficulty of financial year. Such difficulty was to be finalised in accordance with the provisions and the date of search and seizure. The observations in this respect of the learned C.I.T. (A) has again mislead him to arrive at a wrong conclusion.”

11. The Tribunal lost sight of the fact that Section 69 of the Act opens with the words “Where in the financial year immediately preceding the assessment year, the assessee has made investment .....” Therefore, in the first instance it was incumbent upon the authority to establish that there were investments made by the assessee ; that such investments were not recorded in the books of account maintained by the assessee ; and that, such investments had been made in the financial year immediately preceding the assessment year in question. Unfortunately, despite the Commissioner (Appeals) having recorded a categorical finding, the Tribunal has failed to appreciate the said finding and dealt with the same without giving cogent reasons. If the Tribunal found that the said finding was not correct, it was necessary for the Tribunal to have recorded reasons for reversing the same. The observation of the Tribunal that the difficulty as to financial year had to be finalised in accordance with the provisions and the date of search and seizure is too general and vague. It does not indicate anything. When the provision requires fulfillment of certain prerequisite conditions before the assessee can be called upon to explain, the Tribunal has to record its finding on this issue in a specific manner, because the case of the assessee all along has been that in the first place the seized documents do not reflect any investments, in the second place, even if the entries could be treated as investments made by the assessee, it was further necessary to show that such investments have been made by the assessee in the financial year immediately preceding the assessment year and are not recorded in the books maintained by the assessee. The Tribunal's order does not record any findings. In fact, the Tribunal is hardly aware, it appears, as to what the requirements of Section 69 are, and if it is aware, it has consciously chosen to ignore the same. It could not have done so in face of the finding recorded by Commissioner

(Appeals) on this issue.

12. Even if the contention of revenue that provisions of Section 132(4A) of the Act are available to revenue during course of regular assessment proceedings is accepted for the sake of argument, yet none the less, the prerequisite conditions of Section 69 of the Act cannot be given a go by and have to be met with. The view expressed by this Court derives support from the ratio of the Apex Court decision in case of Prem Dass v. Income Tax Officer (1999)236 ITR 683. While dealing with a case relating to prosecution under Sections 276C and 277 of the Act, it was laid down by the Apex Court that the presumptions under Section 132(4A) of the Act would not establish the ingredients contemplated by Sections 276C and 277 of the Act, and that the High Court was not justified in setting aside the order of acquittal on the basis of Section 132(4A) of the Act. Therefore, even if, the presumption available under Section 132(4A) of the Act can be raised against the assessee the ingredients, by way of prerequisite conditions, of Section 69 of the Act have to be satisfied and cannot be presumed to have been established on the basis of Section 132(4A) of the Act simplicitor.

13. In light of what is stated hereinbefore the impugned order of Tribunal is held to be incorrect in law, in the facts and circumstances of the case and material on record. The Tribunal was not justified in remanding the matter to the Commissioner (Appeals). It was necessary for the Tribunal to have dealt with the applicability of provisions of Section 69 together with provisions of Section 132(4A) of the Act after dealing with the reasons given by Commissioner (Appeals) instead of recording “we are also at a loss to understand as to what to do with the issue at hand “as recorded in paragraph No. 20 of the impugned order.

14. The question referred is therefore answered in the negative i.e. in favour of the assessee and against the revenue. The appeal shall stand restored to the file of the Tribunal and in light of the judgment of this Court, the Tribunal shall rehear the appeal after giving adequate opportunity of hearing to both the sides.

15. The reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.MEHTA, J.)

(HARSHA DEVANI, J.)

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